Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17165/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23rd May 2014	**On 11th June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

BONGANI NKOMO
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Allison of Allison Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Paul promulgated following a hearing on 4th February 2014.

2. The Appellant is a male citizen of Zimbabwe born 5th October 1984 who on 27th March 2013 applied for further leave to remain in the United Kingdom, outside the immigration rules. The application was based upon the Appellant's family and private life in the United Kingdom.

3. The application was refused on 16th May 2013, the Respondent making a combined decision to refuse to vary leave to remain, and making a decision to remove the Appellant from the United Kingdom.

4. The reasons for refusal are contained in a letter dated 16th May 2013. In summary the Respondent contended that the family life that the Appellant claimed to have with his mother and other family members in the United Kingdom did not constitute family life under Appendix FM of the immigration rules, and therefore the application was considered under paragraph 276ADE which sets out the requirements for leave to remain on the grounds of private life.

5. The Respondent noted that the Appellant had entered the United Kingdom on 4th August 2006 and therefore he had not lived continuously in the United Kingdom for at least 20 years. He was not under the age of 18 years, nor was he aged between 18 and 25 years, and therefore the only provision that might apply to him was paragraph 276ADE(vi) which requires that an applicant;

> Is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

6. The Respondent asserted that the Appellant had spent 22 years in his home country of Zimbabwe, although the evidence indicates that the Appellant left Zimbabwe at 18 years of age. The Respondent did not accept that the period of time that the Appellant had spent in the United Kingdom since 4th August 2006, meant that he had lost ties to Zimbabwe. Therefore it was not accepted that the Appellant satisfied the requirements of paragraph 276ADE(vi).

7. The Appellant appealed to the First-tier Tribunal, and the appeal was heard by Judge Paul (the judge) on 4th February 2014. It was confirmed to the judge on behalf of the Appellant, that although there appeared to be reference in the grounds of appeal, to asylum and Article 3 of the 1950 European Convention on Human Rights (the 1950 Convention), the appeal was only being pursued under Article 8 on the basis of family and private life in the United Kingdom. The judge found that the immigration rules provide a framework for an assessment of family and private life and if the Appellant failed to meet those rules, there must be some special factors which can give rise to a further consideration. The judge found that the Appellant did not satisfy the immigration rules, and found that there were no special factors and therefore did not consider Article 8 outside the rules. The appeal was dismissed.

8. The Appellant applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had made no findings as to whether the Appellant had ties with Zimbabwe and had made no findings as to whether the Respondent's decision was in accordance with the law. It had been contended that the decision was not in accordance with the law because the Respondent's decision maker had failed to consider whether there were any exceptional circumstances in the Appellant's case and had therefore failed to follow the Respondent's policy. It was contended that the Respondent should have considered in addition to the Appellant's private life, the family life the Appellant has in the United Kingdom, and the judge had erred by not making findings upon this.

9. It was contended that the judge had made a perverse finding by concluding that the Appellant's case was not exceptional and had given inadequate weight to the fact that the Appellant had been living with his mother and formed part of her household since his arrival in the United Kingdom in 2006. It was contended that the judge in paragraph 30 of the determination had made reference to the wrong legal test, by referring to "an insurmountable obstacle".

10. Permission to appeal was granted by Judge of the First-tier Tribunal Pooler in the following terms;

    1. Judge Paul dismissed the Appellant's appeal against the decision of the Respondent to refuse to grant leave to remain in the UK and to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

    2. The application for permission submits that the judge erred in law by failing to make findings on whether the Appellant had ties with Zimbabwe; whether the decision was in accordance with the law; failing to adopt the structured approach set out in R (Razgar) v SSHD [2004] UKHL 27; reaching the perverse finding that the Appellant's case was not exceptional; failing to take a relevant factor into account; and applying the wrong test of 'insurmountable obstacles'.

    3. Arguably the judge, who dismissed the appeal by reference to the immigration rules, erred in law in relation to para 276ADE(vi) by failing to find whether the Appellant had no ties to Zimbabwe.

    4. There is less force in the remaining grounds; the judge approached the Article 8 appeal bearing in mind Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC), a decision of the UT which was binding on him; but since permission is to be granted all grounds may be argued.

11. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the First-tier Tribunal determination did not disclose a material error of law, as it was clear that the Appellant's case was primarily advanced on the basis of his relationship with his mother. The Appellant had only been in the United Kingdom since 2006 and maintained family links with Zimbabwe.

12. Directions were subsequently issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

Submissions

13. Mr Allison relied upon the grounds contained within the application for permission to appeal, and his skeleton argument, in submitting that the judge had erred in law such that the decision should be set aside.

14. Mr Duffy accepted that the judge had not made findings on the issue of whether the Appellant had ties to Zimbabwe and that was an error, but he submitted it was not material. This was because it was clear that the Appellant did have ties to Zimbabwe, for example his grandmother still lived there, and the Appellant had spent the greater part of his life in Zimbabwe, and the longer an individual spent in a country, the longer it takes to lose ties. I was asked to take into account that the Appellant grew up in Zimbabwe and spent his formative years there. Mr Duffy submitted that if the judge had made findings on this issue he would have had to find that the Appellant had ties to Zimbabwe.

15. Mr Duffy submitted that the contention that the Respondent's decision was not in accordance with the law had no merit as it was clear that there were no exceptional factors, and if the Respondent had considered that there were such factors, these would have been mentioned in the refusal letter. The Respondent's decision that the Appellant did not have family life that engaged either Appendix FM, or Article 8, was a decision that was open to the Respondent. The family life claim was between an adult and his mother, and although there may be family life in such circumstances, that was not always the case, and it was not the case in this appeal.

16. I was asked to accept that there is a very high threshold for perversity, and there was nothing in the First-tier Tribunal to suggest that a perverse decision had been taken. The grounds disclosed disagreement with the findings made by the judge but did not disclose material errors.

17. Mr Duffy accepted that in paragraph 30 the judge had referred to "an insurmountable obstacle" and this was not the appropriate test, but submitted that the judge meant to record that removal was not disproportionate.

18. Mr Allison responded by contending that the determination was unsafe and that the judge should have made a finding as to whether the Appellant had ties to Zimbabwe. Mr Allison pointed out that these issues were raised in the skeleton argument before the First-tier Tribunal.

19. Mr Allison referred to the Respondent's guidance on long residence and private life, valid from 11th November 2013, a copy of which had been provided to the judge. Mr Allison submitted there was reference in that

guidance to granting leave outside the rules if exceptional circumstances applied, and that caseworkers must consider whether there are exceptional circumstances in every case where an applicant falls for refusal under the rules. There was no evidence that exceptional circumstances had been considered in this case, and therefore the Respondent had not followed the policy, and the judge should have made findings upon this.

20. At the conclusion of oral submissions I indicated that I wished to consider what had been put before me before making a decision. Both representatives indicated that if an error of law was found and the decision needed to be re-made, there would be no further submissions to be made, nor any further evidence to be called and the decision could be re-made on the basis of the evidence that was before the First-tier Tribunal. I therefore reserved my decision.

Error of Law

21. In my view the judge erred by not making findings as to whether the Appellant had ties to Zimbabwe. This was an issue raised by the Appellant, and therefore needed to be determined. In my view this was a material issue, and a material error of law in failing to consider the issue of ties.

22. In addition the judge erred in making reference to "an insurmountable obstacle" in paragraph 30 of the determination. That is not the appropriate test in this appeal. I conclude that these errors are material, and mean that the determination is unsafe and is therefore set aside.

Re-Making the Decision

23. In re-making the decision I take into account the following documentation;

    (i) Respondent's bundle with Annexes A-C;

    (ii) Appellant's bundle comprising 34 pages;

    (iii) Home Office guidance on long residence and private life valid from 11th November 2013;

    (iv) two skeleton arguments submitted on behalf of the Appellant.

The Appellant's Case

24. In summary the Appellant's case is that he was born in Harare on 5th October 1984 and was educated in Zimbabwe until 2003 when he left to study in Australia for three years. He never knew his father and was raised by his mother. The Appellant's mother migrated to the United Kingdom in 2003 after the Appellant left Zimbabwe to travel to Australia. The Appellant entered the United Kingdom on 4th August 2006 with leave

as a student which was subsequently extended. He thereafter had leave as a post-study worker from 14th April 2011 until 14th April 2013. The Appellant's life in the United Kingdom is centred on his relationship with his mother and her friends and church activities.

25. The Appellant's mother came to the United Kingdom as a Highly Skilled Migrant in March 2003. She is now a naturalised British citizen. The Appellant's extended family includes his mother's aunt and niece who are both British citizens. The Appellant has an aunt who lives in Canada and an uncle who lives in South Africa.

26. The only family that the Appellant has in Zimbabwe is his maternal grandmother who lives in the family home and with whom the Appellant, according to his evidence before the First-tier Tribunal is still in contact. The Appellant's grandmother is frail and has a carer. The Appellant and his mother gave evidence before the First-tier Tribunal, that the Appellant's grandmother would not be able to provide him with emotional support.

My Conclusions and Reasons

27. I have taken into account all the evidence placed before me. In relation to the immigration rules the burden of proof is on the Appellant, and the standard is a balance of probability.

28. I must firstly consider whether this appeal can succeed under the immigration rules.

29. Appendix FM sets out the requirements to be met by an individual wishing to enter or remain in the United Kingdom based upon family life. But there are no provisions within Appendix FM which would entitle the Appellant to remain in the United Kingdom. This has not been disputed on behalf of the Appellant. Therefore the appeal cannot succeed with reference to Appendix FM.

30. I therefore move on to consider paragraph 276ADE. It is accepted on behalf of the Appellant that the only provision under which he can succeed, is (vi). The issue that I have to consider is whether the Appellant has no ties to Zimbabwe. I have taken into account the guidance in Ogundimu Nigeria [2013] UKUT 00060 (IAC) in considering this issue. It was recognised in paragraph 124 that the test under paragraph 276ADE(vi) is an exacting one, and that there must be a rounded assessment of all the relevant circumstances, and the assessment should not be limited to "social, cultural and family" circumstances when considering whether a person has 'no ties'.

31. I set out below paragraphs 123 and 125;

> 123. The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a

> continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.
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> 125. Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country to which they would have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom; the age that the person left that country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members.

32. The Appellant has spent the greater part of his life in Zimbabwe. He was born there and spent his formative years there and was educated until the age of 18 in Zimbabwe. He was an adult when he left to travel to Australia where he lived for three years.

33. It is not contended that the Appellant would have any language difficulties in Zimbabwe. I accept that the Appellant does not have friends in Zimbabwe, and I also accept that the only family member is his elderly grandmother with whom he has remained in contact. The Appellant's grandmother lives in the family home in Zimbabwe.

34. Taking the above into account, it is my conclusion that it cannot be said that the Appellant has no ties to Zimbabwe. Therefore he cannot succeed under paragraph 276ADE(vi).

35. I next address Mr Allison's submission that the Respondent's decision was not in accordance with the law as the guidance on long residence and private life had not been followed.

36. The guidance does indicate that a caseworker can grant leave to remain outside the immigration rules if exceptional circumstances apply, and the caseworker must consider whether there are exceptional circumstances in every case where the application is refused under the rules. Guidance is given on the meaning of exceptional, the Respondent's view is that exceptional means that removal would result in unjustifiably harsh consequences for the individual so that refusal of the application would not be proportionate under Article 8, and the view is expressed that this is likely to be the case only very rarely.

37. Guidance is also given that the caseworker should take into account cumulative factors, such as where an applicant has family members in the United Kingdom but the family life does not provide a basis to remain, and they also have a significant private life in the United Kingdom for example

an adult child and parent relationship which does not normally qualify as family life under Article 8. In considering whether there are exceptional circumstances, a caseworker should take both family and private life into account.

38. There is no reference to exceptional circumstances in the refusal letter, and it might have been helpful if there had been some such reference. However there is reference in the letter to the Appellant's claimed family life with his mother and her family members and it is evident that this was considered by the decision maker, who concluded that such family life did not fall within Appendix FM. The decision maker was therefore aware of the Appellant's relationship with his mother, and apparently the decision maker took into account other factors listed in the guidance, such as length of time that the Appellant has been in the United Kingdom, and the fact that he had always been in the United Kingdom legally.

39. The fact that the refusal letter does not refer specifically to exceptional circumstances does not mean, without more, that the guidance has not been followed, and in my view the decision is in accordance with the law, and the decision maker has taken into account all the relevant factors in the Appellant's application, and considered them cumulatively, and concluded there are no exceptional circumstances that would justify allowing the application outside the immigration rules. The decision letter could have been more comprehensive, but it is not unlawful.

40. Having decided that this appeal cannot succeed under the immigration rules, I have to consider whether Article 8 should be considered outside the rules. I set out below paragraph 24(b) of Gulshan;

> (b) after applying the requirements of the rules, only if there may arguably be good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: Nagre;

41. In my view there are no arguably good grounds for granting leave to remain outside the immigration rules, having considered the circumstances of this appeal, but if I am wrong about that, I have gone on to consider whether there are compelling circumstances not sufficiently recognised under the rules.

42. In considering Article 8 I take into account that it is now established by case law that there is no "near miss" principle under Article 8, and as was stated in paragraph 57 of Patel & Others [2013] UKSC 72;

> It is important to remember that Article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human rights.

43. I have considered the five stage approach advocated by Razgar. Very often the relationship between an adult child and a parent will not amount to family life. That is not always the case. It was decided in Ghising

(family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC) that each case should be analysed on its own facts to decide whether or not family life exists within the meaning of Article 8(1), and that whilst some generalisations are possible each case is fact-sensitive. In order for a parent and an adult child to establish family life under Article 8, there must be further elements of dependency, involving more than the normal emotional ties. In this case the Appellant and his mother lived apart for approximately three years, while the Appellant studied in Australia, although they have lived together since the Appellant arrived in this country in 2006. At present it appears that the Appellant is financially supported by his mother in addition to the emotional support that they give each other. I am satisfied on a balance of probabilities that they have established family life.

44. The decision to remove the Appellant would be an interference with his family and private life, and I then have to consider the fourth and fifth questions posed in Razgar, and that is whether the interference is necessary in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others, and if the decision is necessary for one of those reasons, whether the decision is proportionate to the legitimate public end sought to be achieved.

45. I also bear in mind that the decision in Beoku-Betts [2008] UKHL 39 means that I have to consider the rights of other family members affected by the decision not only the Appellant. In this case I have to consider the Appellant's mother. I do not find the Appellant has established a family life with his other relatives in the United Kingdom.

46. I take into account the Appellant has lived in the United Kingdom since 2006 and that he and his mother both wish him to remain in this country, as do their extended family members here.

47. However Article 8 does not bestow upon an individual the automatic right to choose in which country he wishes to live. I have to place substantial weight on the fact that the Appellant cannot meet the requirements of the immigration rules. I also place great weight upon the need to maintain effective immigration control, which is necessary in this case in the interests of the economic well-being of the country.

48. In considering proportionality I also take into account that the Appellant spent the greater part of his life in Zimbabwe, and that he spent his formative years there. The Appellant has only ever had limited leave to remain in the United Kingdom, and he has never had any legitimate expectation that he would be allowed to settle here.

49. I also take into account that the Appellant is 29 years of age, and that there are no relevant health or medical issues. This is not a case where the interests of children are involved.

50. The Appellant would have no language difficulties in Zimbabwe and would have accommodation. He is highly educated which would assist in finding employment. Family members, including his mother, could visit him in Zimbabwe if they wished. The Appellant and his mother previously lived apart for a substantial period of time, and did so on a voluntary basis. They could do so again and keep in touch by modern methods of communication and visits. Although both the Appellant and his mother would be disappointed if he had to leave the United Kingdom, there is in my view nothing to prevent them from carrying on with their lives, and it is not the case that they are so dependent upon each other that they could not live apart.

51. I therefore conclude the Respondent's decision is necessary, and it is proportionate in that there are no compelling circumstances to indicate that the Appellant's removal would be unjustifiably harsh.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeal is dismissed under the immigration rules and on human rights grounds.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date: 5th June 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date: 5th June 2014

Deputy Upper Tribunal Judge M A Hall